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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

NO. A-943

PAUL RUIZ and EARL DENTON — PETITIONERS

VS.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

# BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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Respondent, State of Arkansas, responds to petitioners' petition for writ of certiorari to the Supreme Court of Arkansas.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Arkansas death penalty statutory scheme is unconstitutional in discouraging assertion of the Fifth Amendment right not to plead guilty and needlessly penalizing exercise of the Sixth Amendment right to trial by jury.

II. Whether the State court should have allowed petitioners an opportunity to present and develop, in a postconviction proceeding, their claims of violations under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

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## OPINION BELOW

Contrary to the statement of petitioners that the opinion of the Supreme Court is unreported, it is reported. Ruiz & Denton v. State, 275 Ark. 410, 630 S.W.2d 44 (1982).

## JURISDICTION

Respondent concedes that this Court has jurisdiction to review this case.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

All constitutional and statutory provisions relied upon by respondent are included in the petition and will not be reiterated.

## SUMMARY OF RESPONDENT'S ARGUMENT

I.

The Arkansas Supreme Court correctly construed the cases decided by this Court and decided that the line of cases beginning with Brady v. United States, 397 U.S. 742 (1970), controls, since that line of cases significantly modified the rationale underlying United States v. Jackson, 390 U.S. 570 (1968). The Arkansas statutory scheme for the imposition of the death penalty permits a capital defendant to plead guilty but requires discretionary action by both the prosecutor and the trial court before a jury trial on either guilt or penalty may be waived. This scheme is designed to protect the rights of a capital defendant not to chill the exercise of his right to jury trial.

II.

The Arkansas Supreme Court was justified in denying petitioners an evidentiary hearing in the trial court. The allegations regarding ineffective assistance of counsel in the penalty phase were vague and unsupported by sufficient factual allegations, and the record reflects that petitioners knowingly and intelligently acquiesced in joint representation by their attorneys. There was no showing of prejudice, which is required. This Court has never held that the States must afford any specific postconviction procedure, much less that they must afford postconviction evidentiary hearings to petitioners who make only speculative and conclusory allegations of possible prejudice.

## REASONS FOR DENYING THE WRIT

### I.

### THE ARKANSAS DEATH PENALTY STATUTE IS NOT FACIALLY UNCONSTITUTIONAL SINCE IT DOES NOT UNCONSTITUTIONALLY DISCOURAGE ASSERTION OF THE FIFTH AMENDMENT RIGHT NOT TO PLEAD GUILTY NOR PENALIZE THE EXERCISE OF THE SIXTH AMENDMENT RIGHT TO TRIAL.

Respondent first submits that the Arkansas Supreme Court correctly analyzed United States v. Jackson, 390 U.S. 570 (1968), construed it with the line of cases which reflect the evolution of this Court's holdings on the permissible encouragement of guilty pleas, and came to the conclusion that Arkansas' statutory scheme for the imposition of the death penalty is not violative of the United States Constitution. Ruiz & Denton v. State, 275 Ark. 410, 630 S.W.2d 44 (1982).

Petitioners allege that the statutory scheme provides that the trial court may never impose a sentence of death. They do not, however, cite to any statutory authority for this proposition. Perhaps that is because the Arkansas statutes simply do not explicitly provide that prohibition.

It is interesting that petitioners have ignored the Arkansas Supreme Court's reliance on Brady v. United States, 397 U.S. 742 (1970), the first of the cases which began the evolutionary process away from this Court's holding in Jackson that a statute may not needlessly encourage guilty pleas. Brady made it clear that "a plea bargain is not invalid per se merely because it is induced by fear of receiving the death penalty or because in agreeing to the plea bargain the defendant averts the possibility of receiving the death penalty." Ruiz, 275 Ark. at 414.

While this Court has never explicitly overruled Jackson, Justice Stevens stated quite plainly in a later opinion that the "holding in Jackson. . .has been divorced from the rationale on which it rested," and that he therefore dissented from the "repudiation" of Jackson. Corbitt v. New Jersey,

439 U.S. 212, 229 (1978) (Stevens, Brennan & Marshall, JJ., dissenting).

The majority in Corbitt specifically held that the underlying rationale of Jackson was overruled:

> The cases in this Court since Jackson have clearly established that not every burden on the exercise of a constitutional right and not every pressure or encouragement to waive such a right, is invalid. Specifically, there is no per se rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea.

Corbitt, 439 U.S. at 218.

The Supreme Court explained in Corbitt, that "plea bargaining by state prosecutors operates by virtue of state law, here by virture of the formal rules of the Supreme Court of New Jersey. That system permits a proper amount of leniency in return for pleas, leniency that is denied if one goes to trial." Corbitt, 439 U.S. at 224 n. 14. The Court further noted that it could not "hold that the legislature may not openly provide for the possibility of leniency in return for a plea." Corbitt, 439 U.S. at 224 n. 14. The discretion left to the prosecutor was emphasized at 220, at 224 n. 14 and that left to the trial court at 217-18, 222, 224 n. 14.

Others in that line of cases are McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970), and Chaffin v. Stynchcombe, 412 U.S. 17 (1973). One of the strongest in that line is Bordenkircher v. Hayes, 434 U.S. 357 (1978).

In Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979), the defendant alleged that a section of the Florida death penalty statute was being systematically used to induce guilty pleas, resulting in the same effect as the statute in Jackson. The Fifth Circuit quoted at length from Proffitt and Gregg, noting this Court's approval of the discretion which must necessarily be exercised by a prosecutor at various stages of any criminal prosecution, including capital cases. In rejecting the argument, it held at 608-09 (footnotes omitted):

> Second, the Supreme Court in Bordenkircher v. Hayes, 434 U.S. 357, 365, 98 S.Ct. 663, 669, 54 L.Ed.2d 604 (1978), recently held that plea-bargaining, in which the prosecutor openly presents a defendant with the unpleasant alternatives of pleading guilty to a lesser charge and foregoing trial or pleading not guilty and facing a more serious charge on which he plainly is subject to prosecution, and for which he would receive upon conviction life imprisonment, does not violate the Due Process Clause of the Fourteenth Amendment. The fact that the prosecutor's plea-bargaining tool in Bordenkircher was life imprisonment and in this case it allegedly is the death penalty is a distinction without a difference. Bordenkircher controls the instant case. See, e.g., Montgomery v. Estelle, 5 Cir., 1978, 568 F.2d 457. Finally, it is well settled that a plea bargain is not invalid per se because it is induced by fear of receiving the death penalty or because in agreeing to the plea bargain the defendant averts the possibility of receiving the death penalty. See, e.g., Brady v. United States, 397 U.S. 742, 747, 90 S.Ct. 1463, 1468, 25 L.Ed.2d 747 (1970). Thus, if Florida prosecutors actually are using the threat of the death penalty under Section 921.141 in their plea-bargaining to induce guilty pleas, the practice is permissible and the petitioner's contention is without merit. (Footnotes omitted.)

Even if, as petitioners allege, Ark. R. Crim. P. 31.4, Ark. Stat. Ann., Vol. 4A (Repl. 1977), appears to prohibit the imposition of the death penalty on capital defendants who waive a jury trial, it has one element which saves it from a violation of Jackson. Subsections (b) and (c) make it clear that the discretion of both the prosecutor and the trial court are involved in any decision which involves a waiver of jury trial. This Court's later cases have made it clear that the exercise of prosecutorial discretion, especially that specifically provided by statute or rule, to allow a defendant to mitigate the severity of the possible sentence as an inducement to aid the State's interest in avoiding trial, is perfectly permissible. That appears to be exactly the situation at which Rule 31.4 is aimed.

Jackson should not be allowed to prevent capital defendants from exercising the free exercise of their opportunity to "spare

themselves and their families the spectacle and expense of protracted courtroom proceedings," Jackson, 390 U.S. at 584, in exchange for the mitigation of their sentences, nor should it be permitted to prevent the prosecutor, in the exercise of his well-recognized discretion, from sparing the State the same ordeal. Rule 31.4 merely permits a defendant to waive his rights, with that waiver specifically protected by a requirement that the trial court find it "voluntarily and freely proffered without compulsion or coercion." It also specifically provides for the free exercise of prosecutorial discretion as to waiver of the death penalty. The trial court must then approve the waivers of both the death penalty and the right to trial. Much more importantly, however, Rule 31.4 assures a capital defendant who desires to waive jury trial that if that waiver is approved by the court, he is protected from the imposition of the death penalty. It is difficult to see how a State could more equitably provide for waiver of jury trial or how it could better provide protection for a capital defendant.

The most ridiculous part of this whole issue is that to strictly comply with petitioner's reasoning pursuant to Jackson, subsection (b) of Rule 31.4 would have to be eliminated. That would only omit any assurance to a defendant wishing to waive jury trial that he could not be executed. In light of later cases, surely this Court does not intend such a punitive result -- that a State may only allow a capital defendant to waive jury trial if it also assures him that he can be executed in spite of that waiver. To focus only on the narrow holding in Jackson, obviously based on specific factors of statutory construction and legislative history not present here, and to ignore the overwhelming authority of later cases specifically authorizing procedures provided in Rule 31.4 would be the epitome of elevating of form over substance.

## II.

### THE ARKANSAS SUPREME COURT PROVIDED PETITIONERS WITH CONSTITUTIONALLY ADEQUATE POSTCONVICTION REVIEW.

Petitioners devote the bulk of their argument under Point II to the Arkansas Supreme Court's holding that the issue of ineffective assistance of counsel at the penalty phase was procedurally barred. Actually, the Court held that both issues presented were procedurally barred because of petitioners' failure to raise them to the trial court. Since the Court then proceeded to reach the merits of both issues, Ruiz, 275 Ark. at 412, review by this Court is not barred, and petitioners were not faced with the "impossible dilemma" they describe.

Thus, petitioner's only viable argument, after the procedural bar assertions are eliminated, is that they were not afforded a hearing on their petition for Rule 37 relief. Respondent submits that the Arkansas Supreme Court properly denied petitioners a hearing in State trial court because it essentially gave them one by reaching the merits of the ineffective assistance issue themselves. This Court has made it clear that a fact-finding procedure in a State appellate court is considered a "hearing" for purposes of federal habeas corpus review. Sumner v. Mata, 101 S.Ct. 764 (January 21, 1981). It is no less a "hearing" for Rule 37 purposes, especially since Rule 37 is a postconviction review procedure similar to federal habeas corpus.

This Court has never held that the Constitution compels the states to provide specific postconviction procedures to persons claiming violations of their federal constitutional rights. Carter v. Illinois, 329 U.S. 173 (1946). Rather, this Court has stated that although the Constitution commands the states to assure fair judgment, wide discretion is left to the states in deciding the manner of adjudicating a claim that a conviction is unconstitutional. Young v. Ragan, 337 U.S. 235, 238 (1948); Hysler v. Florida, 315 U.S. 411 (1946). As

the Court stated in Carter, 329 U.S. at 175-76:

> Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional. States are free to devise their own systems of review in criminal cases. A State may decide whether to have direct appeals in such cases, and if so under what circumstances. . . .In respecting the duty laid upon them by Mooney v. Holohan, States have a wide choice of remedies. A State may provide that the protection of rights granted by the Federal Constitution be sought through the writ of habeas corpus or coram nobis. It may use each of these ancient writs in its common law scope, or it may put them to new uses; or it may afford remedy by a simple motion brought either in the court of original conviction or at the place of detention. . .So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated. [Citations omitted.]

This philosophy was reaffirmed in Young, 337 U.S. at 238, wherein it was emphasized that "Illinois may choose the procedure it deems appropriate for the vindication of federal rights." The most revealing statement of the deference afforded states in fashioning postconviction remedies is found in Justice Jackson's concurring opinion in Brown v. Allen, 344 U.S. 443, 541 (1953) (emphasis added):

> The states all allow some appeal from a judgment of conviction which permits review of any question of law, state or federal, raised upon the record. No state is obliged to furnish multiple remedies for the same grievance. Most states, and with good reason, will not suffer a collateral attack such as habeas corpus to be used as a substitute for or duplication of the appeal. A State properly may deny habeas corpus to raise either state or federal issues that were or could have been raised on appeal. Such restriction by the state should be respected by federal courts.

In Hysler, an individual convicted of murder sought a writ of coram nobis from the Supreme Court of Florida which had affirmed his conviction on direct appeal three years earlier. The Florida Supreme Court refused to grant the petition. The United States Supreme Court granted certiorari on the question of whether due process had been denied the petitioner because of the alleged use of perjured testimony by the prosecution at trial. In affirming the denial of the writ, the Court found that Florida's postconviction process met the requirements of due process.

Describing the case as an "unedifying story in the administration of criminal justice," id. at 415, the Court noted that the petitioner raised his claim "after leaden-footed justice had reached the end of the familiar trial of dilatory procedure." Id. at 417. The Court held at 422:

> However ineptly the Florida Supreme Court may have formulated the grounds for denying the application, its action leaves no room for doubt that the Court deemed the petitioner's claim without substantial foundation. We construe its finding. . .to mean that the petitioner had failed to make the showing of substantiality which, according to the local procedure of Florida, was necessary in order to obtain the extraordinary relief.

Petitioners have failed to raise an issue of constitutional magnitude because this Court has never held that the State equivalent of habeas corpus review is required under the United States Constitution; it has held that where such opportunity for relief is afforded, the scope of that review and the procedure by which relief may be granted is within the discretion of the State.

Despite the allegations of petitioners, there is simply no difference between the trial court's review of the files and records and the entering of written findings and the Arkansas Supreme Court's written findings in this case. In short, there is no unconditional right pursuant to the United States Constitution to a postconviction evidentiary hearing in the trial court. Any such opportunity granted by the Arkansas Supreme Court is based on the substance and strength of the grounds alleged. The exercise of that discretion by the Arkansas Court is similar to the discretion of the Florida Supreme Court in Hysler.

Petitioner filed his Rule 37 petition pursuant to Rule 37.2 (a) after having already prosecuted a direct appeal to the Arkansas Supreme Court. That provision requires the permission of the Arkansas Supreme Court before the defendant may return to the trial court with his contentions. The logical purpose of this provision is obvious: Rule 37 is designed to afford the opportunity for relief to those defendants who have not

otherwise had an opportunity for review of the claims of constitutional deprivation. It is not intended as a second appeal procedure. Collins v. State, 271 Ark. 825, 828, 611 S.W.2d 182 (1981).

Petitioners also argue that the Arkansas Supreme Court's standard of ineffective assistance is in conflict with that of the Eighth Circuit Court of Appeals. Even if that were true, which respondent does not concede, petitioners' allegations would have no merit if reviewed under the Eighth Circuit standard. (While petitioners urge that "prejudice" is not the issue, that would certainly be the issue if the Eighth Circuit were reviewing the allegations. Petitioners have conveniently neglected to provide this Court with the complete Eighth Circuit standard, which includes a showing of prejudice, United States v. Bad Cob, 560 F.2d 877, 880 (8th Cir. 1977); United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976); McQueen v. Swenson, 498 F.2d 207, 220 (8th Cir. 1974), and at least a showing of dereliction of duty, Zaehringer v. Brewer, 635 F.2d 734 (8th Cir. 1980); United States v. Rhoads, 617 F.2d 1313 (8th Cir. 1980).

The Arkansas Supreme Court properly found that petitioners were specifically apprised of a possible conflict of interest in joint representation, were questioned about it in front of the trial court, and intelligently and voluntarily acquiesced to joint representation. Ruiz, 275 Ark. at 415. Actually, petitioners apparently insisted on joint representation.

Petitioners conceded in their Rule 37 petition that neither they nor their attorneys ever requested a severance of defendants but alleged that they did not knowingly and intelligently waive their right to separate representation. They also conceded that they were specifically asked if they had been apprised by counsel of a possible conflict in joint representation. One defense attorney questioned petitioners for the record, stating that the attorneys wanted the record to reflect that they had discussed at length with the defendants any possibility there might be a conflict because both attorneys represented both

petitioners. He also stated that after a third attorney came into the case, they again discussed with petitioners at length any possible conflict by the third attorney representing both of them. Both petitioners then confirmed that the matter had been discussed with them at length and both denied any objection to being jointly represented.

This dialogue indicates that petitioners were advised, apparently repeatedly, by their counsel that either or both might be prejudiced by joint representation (or joint trial). Apparently, petitioners chose to proceed through both the guilt and penalty phases with joint representation. Respondent submits that the colloquy above is sufficient to show a knowing and intelligent waiver of severance by both petitioners.

It is also significant that petitioners had three appointed attorneys at trial. Even more significantly, those attorneys were apparently keenly aware of the possibility of a conflict in joint representation. The State certainly did not shirk its responsibility to provide adequate counsel for petitioners. Had there been any real conflict, it would seem a simple matter for the attorneys to bring this to the trial court's attention, give the grounds for a severance and request that the duties of representation be equitably divided among the attorneys in a manner that would eliminate any possibility of a conflict. Since they did not do so, it can only be presumed that petitioners preferred to be tried together.

Petitioners have made only vague and conclusory allegations with regard to any prejudice they might have suffered. They allege that they have "dissimilar" backgrounds and psychological profiles and that their past criminal backgrounds are distinguishable. They also argue that there might have been a differing degree of culpability in the crimes. These allegations are not based on any factual allegations of specific evidence that could have been, but was not, introduced because of the joint trial.

Petitioners' present counsel concedes that "no specific evidence was provided" to the Arkansas Supreme Court with regard

to the alleged conflict of interest, blaming the insufficiency of the allegations on her own potential conflict of interest in representing both. In short, petitioners admit that they did not provide the Arkansas Supreme Court with sufficient factual allegations on which to base a finding that an evidentiary hearing was justified. These contentions by present counsel raise another interesting question: If joint representation is so detrimental and if petitioners' counsel is so highly cognizant of the possibility of a conflict of interest, why are petitioners still jointly represented, unless it is by their own choice? This continued joint representation belies their vague and conclusory allegations of conflict of interest.

It is highly significant that there was individual consideration of the petitioners during the penalty phase. Petitioners called four witnesses to testify to mitigating circumstances. All four testified to information about each petitioner. The trial court read and the jury was given separate verdict forms for each petitioner, and the trial court instructed the jury to "decide separately as to each defendant." In closing argument in the penalty phase, one of the attorneys read a poem written by Ruiz and discussed the individual backgrounds of each man.

The Arkansas Supreme Court upheld on appeal the jury's findings of no mitigating circumstances as to either defendant, Ruiz & Denton v. State, 273 Ark. 94, 104, 617 S.W.2d 6, cert. denied, 70 L.Ed.2d 631 (1981). The jury also found all five submitted aggravating circumstances to exist for each petitioner.

In view of what might be termed petitioners' demonstrated determination to be tried together, despite their attorneys' repeated warnings, the trial attorneys had two options: (1) continuing with joint representation, as their clients wished; or (2) withdrawing from the case. Respondent knows of no authority for the proposition that an attorney, in order to be effective, must insist on exercising his own judgment in spite of his client's demand to do things differently.

The attorneys brought the matter to the trial court's attention, presumably to get their clients' waivers on record. The trial court apparently saw no reason to order, sua sponte, a severance at that late date in the trial, and petitioners advance no reasonable argument that it had a duty to do so. The attorneys were neither ignorant of the possible consequences of joint trial nor derelict in acceding to their clients' wishes.

The Arkansas Supreme Court reviewed petitioners' allegations, made findings of fact based on the record and found that they did not raise issues requiring an evidentiary hearing. That holding was firmly based on prior interpretation of the purpose and scope of Rule 37 review, as well as on the substance of the allegations themselves. Petitioners are not entitled to more.

## CONCLUSION

The Arkansas Supreme Court correctly decided the issues presented by petitioners in their Rule 37 petition. The Brady line of cases, including Corbitt and Bordenkircher, control the first issue since they have significantly modified the rationale of Jackson. The Arkansas Supreme Court was not required to afford petitioners a hearing on the ineffective assistance issue, especially since petitioners presented no factual allegations sufficient to justify a hearing and since the court found that the record reflected that they had knowingly and intelligently acquiesced in the procedure.

Respectfully submitted,

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